No. 86-563

Supreme Court, U.S.
FILED
OCT 6 - 1986
JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1986

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARC Z. EDELL
BUDD LARNER GROSS PICILLO
ROSENBAUM GREENBERG & SADE, P.C.
Attorneys for Petitioner
150 John F. Kennedy Parkway, CN 1000
Short Hills, New Jersey 07078-0999
(201) 379-4800

Of Counsel:
ALAN M. DARNELL
WILENTZ, GOLDMAN & SPITZER
900 Route 9 Box 10
Woodbridge, New Jersey 07095
(201) 636-8000

4649
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-4640 • PA (215) 563-5587 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTION PRESENTED

Whether a state authorized award of compensatory damages against a cigarette manufacturer arising from the inadequacy of health warnings provided to its consumers and its improper advertising practices is preempted by the Federal Cigarette Labeling and Advertising Act.

PARTIES

The parties appearing in the United States Court of Appeals for the Third Circuit were Antonio Cipollone, individually and as Executor of the Estate of Rose D. Cipollone, appellee below, and three cigarette manufacturers: Liggett Group, Inc., Philip Morris, Incorporated, and Loew's Theatres, Inc., appellants below.

The petitioner for this writ of certiorari is Antonio Cipollone. The respondents are Liggett Group, Inc., Philip Morris, Incorporated, and Loew's Theatres, Inc.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
A. Basis for Federal Jurisdiction in the Court of First Instance.	2
B. Petitioner's Background and Factual Allegations	3
C. The Preemption Defense Raised by Cigarette Manufacturers.	4
D. The Provisions of the Act	4
E. Proceedings in the Courts Below	7
Reasons for Granting the Writ	7

Contents

Page

I. The Third Circuit's decision significantly affects the states' traditional authority to provide tort remedies to their citizens. 7

II. The Third Circuit's opinion is in conflict with other federal and state court opinions. 10

III. The Third Circuit's opinion is in conflict with this court's opinion in *Silkwood v. Kerr-McGee*. 14

IV. Granting certiorari will promote a just, speedy and uniform determination of this issue in cigarette and other product liability actions. 16

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Arata v. Tonezato, 152 Cal. App. 2d 837, 314 P. 2d 130 (1954) 9

Blasing v. P.R.L. Hardenbergh Co., 226 N.W. 2d 110 (Minn. 1975) 9

Brochu v. Ortho Pharm. Corp., 642 F. 2d 652 (1st Cir. 1981) 8, 9

Cipollone v. Liggett Group, 593 F. Supp. 1146 (D.N.J. 1984) 2, 7, 11, 12, 17, 18

Contents

Page

Cipollone v. Liggett Group, Inc., et al., 789 F. 2d 181 (3d Cir. 1986) 2, 7, 10

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 10

Feldman v. Lederle Labs, 97 N.J. 429 (1984) 9, 17

Ferebee v. Chevron Chemical Co., 736 F. 2d 1529 (D.C. Cir.), cert. denied, 105 S. Ct. 545 (1984) 8, 13

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, (1963) 10

Haight v. American Tobacco Co., (S.D.W.Va. Dec. 26, 1984) reported at 1.2 T.P.L.R. 2.52 ..... 11, 12

Hubbard-Hall Chemical v. Silverman, 340 F. 2d 401 (1st Cir. 1965) 9

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 13

Maize v. Atlantic Ref. Co., 352 Pa. 51, 41 A. 2d 850 (1945) 9

Maryland v. Louisiana, 451 U.S. 725 (1981) 10, 13

O'Brien v. Muskin Corp., 94 N.J. 169 (1983) 16

Palmer v. Liggett, 633 F. Supp. 1171 (D.Mass. 1986), interlocutory appeal certified and accepted, No. 86-8019 (1st Cir. June 4, 1986) 11, 12, 13

Contents

Page

People Express Airlines v. Consolidated Rail Corp., 100 N.J. 246 (1985) 16

Raymond v. Riegel Textile Corp., 484 F. 2d 1025 (1st Cir. 1973) 9

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 13

Roysdon v. R.J. Reynolds, 623 F. Supp. 1189 (E.D.Tenn. 1985), appeal docketed No. 86-5072 (6th Cir. 1/20/86) 11

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984)....9, 11, 14, 15, 16

Skill v. Martinez, 91 F.R.D. 498 (D.N.J. 1981), aff'd, 677 F. 2d 368 (3d Cir. 1982) 9

Stevens v. Parke, Davis & Co., 9 Cal. 3d 51, 107 Cal. Rptr. 45, 505 P. 2d 653 (1973)..... 9

Statutes Cited:

15 U.S.C. § 1331 .....2, 4, 5, 15

15 U.S.C. § 1334 4

28 U.S.C. § 455(a) 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 7

Contents

Page

28 U.S.C. § 1332(a)(1) 3

Rule Cited:

Federal Rules of Civil Procedure, Rule 1 17

Other Authorities Cited:

Cigarette Labeling and Advertising: Hearings on H.R. 3014, 4007, 7051 and 7244 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess. 176 (1965) 6

Cigarette Labeling and Advertising: Hearings on H.R. 643, 1237, 3055 and 6543 Before the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess. 554 & 577-81 (1969) 6

111 Cong. Rec. 16544-16545 (July 13, 1965) 6

Kenny, "The Tobacco Wars", The Boston Globe Magazine, May 11, 1986 at 58 18

L. Tribe, "Anti-Cigarette Suits: Federalism with Smoke and Mirrors," The Nation 788 (June 7, 1986) 8

"Cigarette Cancer Link is Bunk", National Enquirer, March 3, 1968 4

The New York Times, March 2, 1985 at D8, Col. 2 18

The New York Times, March 15, 1985 at B4, Col. 1 18

The Wall Street Journal, April 10, 1986 at 2, Col. 4 18

No.

In The

Supreme Court of the United States

October Term, 1986

ANTONIO CIPOLLONE, individually and as Executor of the Estate of Rose D. Cipollone,

Petitioner,

vs.

LIGGETT GROUP, INC., a Delaware Corporation; PHILIP MORRIS INCORPORATED, a Virginia Corporation; and LOEW'S THEATRES, INC., a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Antonio Cipollone prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit entered on April 7, 1986 (4a), which reversed a judgment of the United States District Court for the District of New Jersey entered on September 24, 1984, as amended on December 11, 1984.

OPINIONS BELOW

The opinion of the Third Circuit (6a) is reported at 789 F.2d 181 (3d Cir. 1986). The opinion of the district court (20a) is reported at 593 F. Supp. 1146 (D.N.J. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1986 (4a). A timely petition for rehearing with suggestion for rehearing en banc was denied on May 9, 1986, with two of nine Circuit judges voting in favor of granting the petition (2a).[1] An order was entered on July 21, 1986 granting an extension of time to file this petition until October 6, 1986 (1a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Cigarette Labeling and Advertising Act (hereinafter the "Act" or "Cigarette Act"), 15 U.S.C. § 1331 *et seq.*, is involved in this case (74a).

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the Court of First Instance.

This action was brought in federal court. The court had

---

1. Petitioner filed a motion on August 26, 1986 pursuant to 28 U.S.C. § 455(a) (1974) to vacate the Third Circuit's opinion based upon Judge James Hunter, III's representation of a cigarette manufacturer in virtually identical litigation while in private practice. Judge Hunter, who authored the Circuit Court's decision, had not disclosed his prior representation to counsel. On September 30, 1986 the Third Circuit denied petitioner's motion (116a) concluding "no reasonable person could question his impartiality." (117a).

original jurisdiction under 28 U.S.C. § 1332(a)(1). The plaintiff is a resident of New Jersey, each of the respondent cigarette manufacturers has its principal place of business in a state other than New Jersey, and the amount in controversy exceeds $10,000 exclusive of interests and costs.

B. Petitioner's Background and Factual Allegations.

This is a products liability action brought by Rose Cipollone in 1983 against the manufacturers of cigarettes that she smoked from 1942 through 1982.[2] Mrs. Cipollone died on October 21, 1984 as a result of metastasis of her cigarette-induced lung cancer to her liver and brain. Her husband, Antonio Cipollone, has continued the lawsuit.

The complaint alleges, *inter alia,* that the cigarette manufacturers are liable for Mrs. Cipollone's death because of their failure to adequately warn of the health consequences of cigarette use and because of their advertising and promotional activities, which undermined or neutralized the effectiveness of the health warnings required by the Act.

Specifically, Rose Cipollone was not aware of the health hazards associated with cigarette smoking when she began smoking in 1942. The warning that cigarette smoking "*may be* hazardous to your health," which appeared on cigarette packages beginning January 1, 1966 pursuant to the Act, did not adequately convey to her the health consequences of smoking. She believed the press releases and promotional materials issued by the tobacco companies and their trade association, which asserted that the causal "link" between cigarette smoking and lung cancer had not been scientifically established. Her perception of the cigarette

---

2. Mrs. Cipollone was first diagnosed as having lung cancer in August 1981. She stopped smoking after her entire right lung was removed in 1982.

smoking health issue was further distorted by her physiological dependence upon cigarettes, by cigarette advertising intended to repress health concerns, and by news articles written by representatives of the cigarette manufacturers, claiming that the cigarette-cancer link was "bunk."[3]

Moreover, any health concern Mrs. Cipollone may have had as a result of the cigarette warning was assuaged when she switched to low tar cigarettes which, based on cigarette advertising, she incorrectly believed to be "milder" and "safe."

C. The Preemption Defense Raised by Cigarette Manufacturers.

The cigarette manufacturers assert as a defense to this action that the Cigarette Act preempts some or all of the petitioner's claims.

D. The Provisions of the Act.

Effective January 1, 1966, Section 1331 of the Act required cigarette manufacturers to place the following warning on all packages of cigarettes: "Caution: Cigarette Smoking May Be Hazardous To Your Health." In 1970, the Act and its warning were amended to require "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." In 1985, the Act was amended to provide four rotational warnings.

Section 1334 of the Act contains the following preemption provision:

---

3. *See e.g.*, headline story in the *National Enquirer* on March 3, 1968 entitled "Cigarette Cancer Link is Bunk" authored by an employee of cigarette manufacturers' public relations firm.

> (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, *shall be required* on any cigarette package.
>
> (b) *No requirement or prohibition* based on smoking and health *shall be imposed under State law* with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. (Emphasis supplied.)

The congressional declaration of policy and purpose of the Act is set forth in 15 U.S.C. § 1331:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent *consistent* with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising *regulations* with respect to any relationship between smoking and health. (Emphasis supplied.)

Neither the Act nor its legislative history reflects a

congressional intent to preempt state tort actions. To the contrary, the legislative history contains explicit references evincing Congress' *assumption* that such claims would continue.[4] The Act does not prohibit cigarette manufacturers from voluntarily providing new or supplemental information to the public about the health hazards of smoking.

---

4. This assumption was highlighted by discussion during the congressional hearings about the effect the Act would have on future personal injury claims. Some speakers were of the opinion that the Act would strengthen the tobacco companies' assumption of risk defense because it would evidence knowledge by the smoker of health hazards. Others felt that the label required by the Act might aid an injured plaintiff by establishing knowledge on the part of the cigarette manufacturers. All assumed the continued viability of these claims. For example, Representative Fascell of Florida in the hearings on S. 559 stated:

> The legislative records make it clear that the passage of this law and compliance by the manufacturer in no way affects the right to raise the defense of an "assumption of risk," . . . nor does it shift the burden of proof nor could it be considered a legal or factual bar to the plaintiff user . . . . By virtue of the language being required as a result of the law, it would raise the presumption that every company that makes and distributes this product does so with knowledge. If that is true, it would redound to the benefit of a plaintiff bringing an injury suit.

111 Cong. Rec. 16544-16545 (July 13, 1965).

Theodore Ellenbogen, Counsel to the United States Department of Health, testified: "[W]e do not consider it our responsibility to compile a report on products liability, because that is a private matter and would not be regulated by this bill." *Cigarette Labeling and Advertising: Hearings on H.R. 3014, 4007, 7051 and 7244 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 176 (1965).

Representative Watson testified: "[N]owhere in the Act of 1965 does it preclude an individual or prevent an individual from pursuing a common-law liability [action] against any tobacco company insofar as I know." *Cigarette Labeling and Advertising: Hearings on H.R. 643, 1237, 3055, and 6543 Before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 554 & 577-81 (1969).

E. Proceedings in the Courts Below.

In 1984, petitioner filed a motion to strike respondents' preemption defense. On September 20, 1984, District Judge H. Lee Sarokin granted that motion, holding that the Act neither expressly nor impliedly preempts state product liability claims and that imposition of liability under state tort standards would not conflict with the purpose of the Act to provide an "adequate" and "nationally uniform" warning.[5] Pursuant to respondents' request, Judge Sarokin certified the "preemption issue" to the Third Circuit pursuant to 28 U.S.C. § 1292(b).

In a sweeping opinion, the Third Circuit reversed Judge Sarokin's order and held that

> the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes.

789 F. 2d at 187 (17a).

The court eliminated petitioner's basic theories of liability on the notion that common law claims would amount to "regulation" prohibited by the Act.

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's decision significantly affects the states' traditional authority to provide tort remedies to their citizens.

The Third Circuit has laid waste to traditional notions of

---

5. 593 F. Supp. at 1166-70 (62a).

federalism. It invoked the doctrine of "implied preemption" in its most ominous form, usurping the states' well-established role in providing their injured citizens with compensation under tort law. Rose Cipollone and the other hundreds of thousands who have fallen victim to the tortious conduct of the cigarette manufacturers will not be the only fatalities of the court's decision:

> [I]t is the broader ramifications of the Third Circuit's ruling that are most ominous. That court's view of preemption has the burning force of a prairie fire, and it is hard to see what structures of state compensation would survive the ensuing conflagration. Food, drugs, cosmetics and toxic substances are all governed in some manner by Federal warning laws. If innocent people are injured because of inadequate warnings, or because advertisements downplay the product's dangers, are all of them barred by Federal law from pursuing tort claims in state court? If so, the circuit court's ruling is cause for a knowing snicker in corporate board rooms across the country.

L. Tribe, "Anti-Cigarette Suits: Federalism with Smoke and Mirrors," *The Nation* 788 (June 7, 1986) (87a).

Thousands of consumer products are governed by federal warning requirements. Heretofore, the overwhelming consensus of the courts has been that compliance with federally mandated labeling requirements does not immunize a manufacturer from liability based on failure to adequately warn of the dangers inherent in those products.[6] The Third Circuit disregarded this precedent.

---

6. *See, e.g., Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (D.C. Cir.), *cert. denied*, 105 S. Ct. 545 (1984) (pesticide); *Brochu v. Ortho Pharm. Corp.*,

(Cont'd)

The Third Circuit concluded that damage awards based upon traditional state tort concepts would "conflict" with the "purpose" of the Act, despite (1) its legislative history which reflects Congress' assumption that such tort actions would continue; (2) the Act's failure to provide any means of compensation to victims of cigarette manufacturers' tortious conduct; (3) the absence of any intent by Congress that state tort actions should be preempted; (4) the established "presumption against such preemption"; and (5) this Court's pronouncements in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

In *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248 (1984), which involved the issue of preemption of state tort claims by the Atomic Energy Act, this Court stated:

> The issue addressed by the court below is important; it affects both the States' traditional authority to provide tort remedies to their citizens and the Federal Government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power.

The same considerations are presented here in the context of a products liability suit based on injuries caused by cigarette smoking.

(Cont'd)

642 F. 2d 652 (1st Cir. 1981) (drugs); *Raymond v. Riegel Textile Corp.*, 484 F. 2d 1025 (1st Cir. 1973) (flammable fabrics); *Hubbard-Hall Chemical v. Silverman*, 340 F. 2d 401 (1st Cir. 1965) (insecticides); *Skill v. Martinez*, 91 F.R.D. 498, 508 (D.N.J. 1981), *aff'd*, 677 F. 2d 368 (3d Cir. 1982) (drugs); *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 107 Cal. Rptr. 45, 505 P. 2d 653 (1973) (drugs); *Arata v. Tonezato*, 152 Cal. App. 2d 837, 314 P. 2d 130 (1954) (cosmetics); *Blasing v. P.R.L. Hardenbergh Co.*, 226 N.W. 2d 110 (Minn. 1975) (flammable products); *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A. 2d 850 (1945) (cleaning solvent); *Feldman v. Lederle Labs*, 97 N.J. 429 (1984) (drugs).

This Court, in carefully guarding the "federal-state" balance, has imposed a high standard for preemption of state authority: "federal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons, either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakenly so ordained."[7] A "presumption" against preemption is mandated by concerns of federalism.[8]

The Third Circuit's opinion, although purporting to apply these principles,[9] in fact ignored them in favor of preemption in the broadest possible terms. The court transformed the Act, intended to foster public understanding of the health consequences of cigarette smoking, into a shield immunizing cigarette companies from liability for their failure to warn of the consequences of cigarette use and improper advertising. Because the opinion addresses a fundamentally important and recurring issue, closely tied to federalism, it should be addressed definitively by this Court.

II.

The Third Circuit's opinion is in conflict with other federal and state court opinions.

The Third Circuit is, to date, the only federal appellate court

---

7. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

8. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981).

9. The court stated: "[b]ecause we are constrained by the presumption against preemption, we cannot say that the language of section 1334 clearly encompasses state common law," 789 F. 2d at 185 (13a), and "we observe that the Cipollones' tort action concerns rights and remedies traditionally defined solely by state law. We therefore must adopt a restrained view in evaluating whether Congress intended to supersede entirely private rights of action such as those at issue here." 789 F. 2d at 186 (15a).

to address the preemption issue in the "cigarette cases." There have been several decisions rendered by the federal district courts. *Cipollone v. Liggett Group*, 593 F. Supp. 1146 (D.N.J. 1984) (20a); *Haight v. American Tobacco Co.*, (S.D.W.Va. Dec. 26, 1984) reported at 1.2 T.P.L.R. 2.52 (89a); *Roysdon v. R.J. Reynolds*, 623 F. Supp. 1189 (E.D.Tenn. 1985), *appeal docketed* No. 86-5072 (6th Cir. 1/20/86); and *Palmer v. Liggett*, 633 F. Supp. 1171 (D.Mass. 1986), *interlocutory appeal certified and accepted*, No. 86-8019 (1st Cir. June 4, 1986).

All these courts have agreed that the Act does *not* expressly preempt state common law claims. None of the courts that examined the Act's legislative history found congressional intent to displace common law tort claims. In fact, they found that Congress assumed such claims would continue.[10]

Subsequent to the Third Circuit's decision in *Cipollone*, the United States District Court for the District of Massachusetts issued a conflicting opinion in which it dismissed the cigarette manufacturers' preemption defense. It specifically *rejected* the Third Circuit's reasoning and adopted the reasoning of the district court in *Cipollone* as well as the reasoning of this Court in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).

> [I]t strains the words of the statute too much to call a damage award aimed at compensating a victim of negligence a "requirement or prohibition" with respect to advertising and labeling. Plaintiffs here seek compensation for injuries, not injunctive relief. If found liable,

---

10. *See Cipollone, supra*, 593 F. Supp. at 1660-62 (50a); *Palmer v. Liggett, supra*, 633 F. Supp. at 1176; *Haight*, 1.2 T.P.L.R. at 2.58 (103a). The Third Circuit in *Cipollone* found it unnecessary to review the Act's legislative history. 789 F. 2d at 186 (14a).

> cigarette manufacturers can choose to supplement their warning labels in an attempt to avoid further liability or keep them the same and pay for the injuries they cause. The Supreme Court has stated that
>
> > regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.
>
> *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). More recently, however, several members of the Court noted that the effect of compensatory awards on defendants' behavior is indirect and not regulatory in nature [citing *Silkwood, supra*, 464 U.S. at 258, 263-64, 276 n.3] . . ., A lawsuit such as the instant designed to compensate a victim of defendants' allegedly wrongful behavior, cannot be deemed a regulation or prohibition within the express terms of section 1334.

Palmer v. Liggett, 633 F. Supp. at 117.[11]

The district courts in *Cipollone, Haight* and *Palmer* noted that in light of (1) the strong "presumption against preemption" necessitated by the need to protect the federal-state balance, (2) the fact that tort compensation has traditionally been an area of state concern, and (3) the absence of an explicit reference in

---

11. *Accord, Cipollone*, 593 F. Supp. at 1167 (64a); *Haight*, 1.2 T.P.L.R. at 2.59 (106a) .

the statute or legislative history to preemption of state tort law, a conclusion in favor of preemption would be "unwarranted and . . . offensive to our federalist tradition."[12]

When Congress decides to act to limit or constrain recovery under state law, that is its prerogative. When a federal appellate court immunizes certain defendants from liability by legislating in place of Congress without any statement of congressional intent in that regard, that court usurps the role of the legislature and ignores the balance of power in our federal system.

As is apparent from the Third Circuit's opinion, the question of precisely how the preemption doctrine should be applied, particularly an "irreconcilable conflict" test continues to pose problems for the lower courts. For example, the Court of Appeals in *Ferebee v. Chevron Chem. Co.*, 736 F. 2d 1529, 1542 (D.C. Cir.), *cert. denied*, 105 S. Ct. 545 (1984), held that a state tort action based upon the inadequacy of health warning labels accompanying paraquat, a pesticide, was not preempted by federal regulations which prescribed the precise language of the warning. It stated that compliance with both federal and state law is not "impossible" since the manufacturer can continue to use an EPA-approved label and can, at the same time, pay damages to tort plaintiffs or can petition the EPA to allow the labels to be made more comprehensive. That ruling is contrary to and was ignored by the Third Circuit in this case. This issue continues to be important and unresolved and this case presents an excellent vehicle for further review.

---

12. *Palmer*, 633 F. Supp. at 1172, 1179-80 (*citing Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also, Cipollone*, 593 F. Supp. at 1148 (22a) ("Before this court or any other court so cavalierly rejects fundamental principles of the common law, it should demand a much more definitive statement from Congress."); *id.* at 1151 (29a) ("Underlying any discussion of preemption . . . is the structural foundation of a federal system, in which state and federal regulation must co-exist. The preservation of that system requires a presumption that Congress did not intend to displace state law.").

III.

The Third Circuit's opinion is in conflict with this court's opinion in *Silkwood v. Kerr-McGee.*

In *Silkwood* this Court held that a state tort action seeking *punitive damages* for personal injuries incurred by a worker in a plant licensed and regulated pursuant to the Atomic Energy Act was not preempted. It did so recognizing that

> an award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards [but nonetheless] . . . insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety . . . but on whether there is an *irreconcilable conflict* between the federal and state standards or whether the imposition of a state standard in a damages action would *frustrate the objectives* of the federal law.

464 U.S. at 256. (Emphasis supplied.)

The Court concluded that an award of damages did not frustrate the objectives of the Atomic Energy Act. *Id.* at 257. It stated that "a primary purpose of the Act, . . . the promotion of nuclear power, is not to be accomplished at all costs," and that since Congress' goal was to develop nuclear energy "*only to the extent it was consistent* with the health and safety of the public . . . Congress therefore disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those who are injured."

Id. Moreover, this Court held that Congress' assumption, as set forth in its legislative history, that "exclusive regulatory authority over the safety aspects of nuclear development" was not inconsistent with recovery for injuries caused by nuclear hazards should not be "second-guessed." *Id.* at 258.

The policy of the Cigarette Act and its legislative history provides an even more compelling basis for rejecting preemption than that found in *Silkwood*. Unlike the primary purpose of the Atomic Energy Act, which is to promote the nuclear power industry, the Cigarette Act's *primary* goal is not to promote the cigarette industry, but rather to inform the public of the health hazards associated with cigarette smoking. The subordinate purpose of the Act was the protection of interstate commerce but *only to the "maximum extent consistent with"* the Act's primary goal of informing the public. 15 U.S.C. § 1331. Despite all this, the Third Circuit held in favor of "preemption," and improperly "second-guessed" Congress by broadly and impermissibly legislating in an area where Congress had not.

With regard to the question of "irreconcilable conflict," this Court in *Silkwood* stated, with regard to atomic energy, it had

> [n]o doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability . . . .Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory

> consequence was something that Congress was quite willing to accept.

464 U.S. at 256

The Third Circuit in this case, ignoring *Silkwood*, found an "irreconcilable conflict" between imposition of tort liability and the purposes of the Cigarette Act based purely on its semantic equation of "regulation" with "tort liability" where no evidence of real conflict existed. The fact that neither a hypothetical conflict nor mere "tension" between tort law and federal regulation will suffice to warrant preemption of state law, *id.* at 257, did not deter the Third Circuit from eliminating certain basic causes of action.

In *Silkwood*, this Court found "it difficult to believe that Congress would without comment remove all means of judicial recourse for those injured by illegal conduct."[13] The Third Circuit displayed no such reticence.

IV.

Granting certiorari will promote a just, speedy and uniform determination of this issue in cigarette and other product liability actions.

The resolution of the preemption issue at this time will avoid the unnecessary expenditure of countless hours by the courts and

---

13. *Id.* at 251. The New Jersey courts have long recognized that the primary purpose of tort liability is compensation not regulation. *O'Brien v. Muskin Corp.*, 94 N.J. 169, 179 (1983). *See also, People Express Airlines v. Consolidated Rail Corp.*, 100 N.J. 246, 255 (1985) (compensation is the "overarching" purpose of tort law). The Act does not provide a means to compensate victims of cigarette manufacturers' tortious conduct.

litigants. *See* Fed. R. Civ. P. 1. Federal and state courts throughout the country are or will be faced with the Third Circuit's pronouncement not only in the context of the "cigarette cases"[14] but also in other products liability actions. For example, in *Feldman v. Lederle Labs*, 97 N.J. 429 (1984), a case in which the New Jersey Supreme Court held that state actions against a drug manufacturer for failure to provide adequate warnings are not preempted by federally mandated labeling requirements, a motion for reconsideration was recently filed based upon the *Cipollone* decision. That matter is presently on appeal. Should this Court fail to grant this petition and resolve the "preemption issue," the result will be a continued legal quagmire in products liability actions in the lower courts resulting in hundreds of hours of briefing and court appearances.

Cipollone has been described as "one of the strongest and most important of the 'cigarette cases.' "[15] The "preemption"

---

14. Motions on "preemption" have been filed or are pending in virtually every state and federal cigarette case in New Jersey and in other states as well.

15. The opinion of the district court in *Cipollone*

> had been widely hailed by plaintiffs' lawyers. The legal argument that the warning is inadequate . . . is central to most of the cigarette product liability cases. The *Cipollone* case had been considered perhaps the most thoroughly prepared and strongest of the dozens of such cases that are pending . . . .
>
> Donald Garner, a Southern Illinois University Law Professor who has written law journal articles on cigarette product liability, agreed that if the appeals court ruling stands, it is a major setback to plaintiffs' lawyers.
>
> "The idea is that defendants [cigarette companies] didn't discharge their civil responsibility to let consumers know just

(Cont'd)

decisions issued in this case have been hailed as "landmarks"[16] or "serious setbacks"[17] to suits against the cigarette companies throughout the country. Because of this, the decisions in *Cipollone* have had a significant impact on attorneys' willingness to undertake "cigarette cases."

Prior to the district court's decision on preemption in this case, very few lawsuits had been filed against tobacco companies in what has been described as the "second wave"[18] of cigarette litigation. Thereafter, hundreds of lawsuits were filed throughout the country. Attorneys, now faced with the Third Circuit's decision have been and will continue to be disinclined to undertake the representation of potential claimants. Until there is an ultimate resolution of the preemption issue, the statute of limitations will continue to run and the rights afforded many injured citizens under traditional state tort law will be lost forever.

(Cont'd)

> how lethal and addictive these products are. To the extent these claims can't be raised I would say it is perhaps a near fatal blow to the primary theory in these cases."

The Wall Street Journal, April 10, 1986 at 2, Col. 4.

16. The *Cipollone* case is considered to be the leading and "most closely watched" action among the lawsuits filed against tobacco companies throughout the nation. This is, in large part, due to the district court's ruling on preemption. *The New York Times*, March 15, 1985 at B4, Col. 1; *The New York Times*, March 2, 1985 at D8, Col. 2.

17. The Third Circuit's reversal of the district court in *Cipollone* was considered "a serious setback" to suits against cigarette companies. Kenny, "The Tobacco Wars", *The Boston Globe Magazine*, May 11, 1986 at 58. The Third Circuit's opinion has been properly interpreted as rendering cigarette companies "immune from suits that charge them with failing to warn consumers of cigarettes' hazards". *Id.*

18. The earlier personal injury cases brought against the cigarette companies in the 1950's and 1960's were unsuccessful.

CONCLUSION

Wherefore, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MARC Z. EDELL
BUDD LARNER GROSS
PICILLO ROSENBAUM
GREENBERG & SADE
Attorneys for Petitioner
150 John F. Kennedy Parkway,
CN1000
Short Hills, NJ 07078-0999

ALAN M. DARNELL
WILENTZ, GOLDMAN &
SPITZER
Of Counsel
900 Route 9
Woodbridge, New Jersey 07095

MARC Z. EDELL
Of Counsel

MARC Z. EDELL
CYNTHIA A. WATERS
On the Petition